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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF WASHINGTON
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7 In Re:)
8 DUNCAN J. McNEIL,)
9 Debtor(s).)

No. 01-06073-W11
Adv. No. A02-00011-W11

10 MARK T. YOUNG LAW CORP. d/b/a)
11 LAW OFFICES OF MARK T. YOUNG,)
12 Plaintiff(s),)

MEMORANDUM DECISION
RE: PLAINTIFF'S MOTION
TO DISMISS "COUNTER-
CLAIMS"

13 vs.)
14

15 DUNCAN J. McNEIL,)
16 Defendant(s).)

17 DUNCAN J. McNEIL,)
18 "Counter Claimant.")

19 BROADWAY BUILDINGS II L.P., et al.,)
20 "Involuntary)
21 Counter Claimants,")

22 vs.)

23 MARK T. YOUNG, et al.)
24 "Counter Defendants.")

FILED

MAY 7 2002

T.S. MCGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

25 THIS MATTER came on for hearing before the Honorable
26 Patricia C. Williams on April 15, 2002 on Plaintiff Mark T. Young
27

28 MEMORANDUM DECISION RE: . . . - 1

1 and Mark T. Young Law Corporation's Motion to Dismiss (Docket No.
2 11). The following parties appeared:

3	<u>Attorney</u>	<u>Representing</u>
4	Mark Young	Mark T. Young Law Corp. & Self
5	Jay Jump	Interested Party

6 The debtor-defendant was not present.

7 The Plaintiff filed this dischargeability action during the
8 pendency of the since dismissed underlying bankruptcy proceeding.
9 The debtor answered the Complaint, asserting various affirmative
10 defenses, "counterclaims" and listing various parties as
11 "involuntary counterclaimants¹." The plaintiff has brought this
12 motion seeking dismissal of the so called "counterclaims"² on
13 various bases. The motion was served on the debtor and other
14 interested parties. The only response received from the debtor
15 was an "Amended Answer" filed the Friday prior to the Monday
16 hearing. The Court reviewed the motion, supporting affidavit,
17

18 ¹This appears to be an unwarranted attempt to apply F.R.B.P.
19 7019 in order to make certain entities parties without having
20 served them. The Involuntary Plaintiff Doctrine is a very
21 limited and seldom used tool whereby a plaintiff names parties,
22 whose rights are then adjudicated without service having
23 occurred. Utilization of this procedural tool requires several
24 elements to be present, most of which do not appear to exist in
25 this case. See Followway Productions, Inc. v. Maurer, 603 F.2d 72
26 (9th Cir. 1979); Caprio v. Wilson, 513 F.2d 837 (9th Cir. 1975);
27 Independent Wireless Telegraph Co. v. Radio Corp. of America, 269
28 U.S. 459 (1926); 7 Charles Allen Wright & Arthur R. Miller,
Federal Practice & Procedure § 1606 (3rd ed. 2001). As such, the
attempted joinder of these parties as claimants is ineffective.

25 ²Some of the claims the defendant has labeled as
26 "counterclaims" appear to be in fact cross-claims, but in the
27 interest of consistency, the court will utilize the term the
debtor has chosen.

28 MEMORANDUM DECISION RE: . . . - 2

1 files and records herein, including the "Amended Answer", has been
2 fully advised in the premises and now enters its Memorandum
3 Decision.

4 The debtor has amended his counterclaims, which he can as a
5 matter of right once before a responsive pleading is served.
6 F.R.B.P. 7015. A counterclaim requires a response and as no
7 answer has been filed, the debtor's counterclaims may be amended
8 once. A motion to dismiss for failure to state a claim does not
9 terminate a party's right to amend. *Mayes v. Leipziger*, 729 F.2d
10 605 (9th Cir. 1984). Consequently, the court will recognize the
11 Amended Answer filed by the debtor on April 12, 2002 to the extent
12 it amends the asserted counterclaims.

13 **SUBJECT MATTER JURISDICTION**

14 The plaintiff argues that the debtor's failure to make any
15 statement as to the court's jurisdiction is grounds for dismissal.
16 A court must always be mindful of its subject matter jurisdiction
17 and should dismiss or transfer the claims if it is lacking.

18 **A. Does this Court Have Subject Matter Jurisdiction**
19 **Over the Counterclaims?**

20 A Bankruptcy Court has jurisdiction over matters which are
21 core under 28 U.S.C. § 157 and over those which are related to
22 bankruptcy proceedings under 28 U.S.C. § 1334. A matter is
23 related to a bankruptcy proceeding if it could conceivably have
24 any effect upon the administration of the bankruptcy estate.
25 *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984); *Feitz v.*
26 *Great Western (In re Feitz)*, 852 F.2d 455 (9th Cir. 1988). Subject

1 matter jurisdiction over a claim is determined at the time that
2 the claim is made. *Feitz; Sizzler v. Belair & Evans (In re*
3 *Sizzler Restaurants)*, 262 B.R. 811 (Bankr. C.D. Cal. 2001). In
4 the instant case, the defendant's answer/counterclaim was
5 initially filed on February 26, 2002 and later amended on
6 April 11, 2002. The underlying bankruptcy proceeding (01-06073-
7 W11) was dismissed on February 21, 2002. The pleadings list
8 purely state law causes of action, not arising out of nor
9 contained in the Bankruptcy Code. The captions also list various
10 Bankruptcy Code sections in an apparent attempt to seek relief
11 under Title 11. Although claims under Title 11 would normally be
12 core proceedings, and in fact 28 U.S.C. § 157 specifically
13 includes an estate's counterclaims within the category of core
14 proceedings, several courts have held, and this court agrees, that
15 the automatic designation of counterclaims as core proceedings
16 applies only to compulsory counterclaims. Noncompulsory
17 counterclaims must have some independent federal jurisdictional
18 basis. *In re Yagow*, 53 B.R. 737 (Bankr. N.D. 1985); *Aerni v.*
19 *Columbus (In re Aerni)*, 86 B.R. 203 (Bankr. Neb. 1988). In the
20 instant case, at least some of the counterclaims appear to arise
21 out of the same nucleus of fact, i.e. the representation by Mark
22 Young of Broadway Buildings. They may therefore be compulsory.
23 To that extent, the debtor's claims are compulsory counterclaims,
24 and this court would have subject matter jurisdiction to hear
25 them. It appears, however, that the defendant's counterclaims, as
26 explained below, are dismissible on other grounds asserted by the
27 plaintiff.

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1 502³, 523⁴, 542⁵ and 510⁶, no justiciable controversy exist outside
2 the context of a pending bankruptcy. The court is therefore
3 without jurisdiction to hear them and they are **DISMISSED**.

4 **RES JUDICATA EFFECT OF PRIOR FEE APPLICATION**
5 **ORDER ENTERED BY CALIFORNIA BANKRUPTCY COURT**

6 The plaintiff has argued that, at least as to himself and his
7 professional corporate entity, the California Bankruptcy Court's
8 order approving professional fees entered in Case No. LA 98-18082-
9 SB on July 20, 2000 precludes the claims now asserted by the
10 debtor against them. In support thereof, the plaintiff has cited
11 several unpublished California Bankruptcy Court cases which have
12 held that a prior hearing resulting in approval of fee
13 applications precludes subsequent suits brought by former clients
14 for alleged malpractice or negligence in performance of
15 professional duties. These cases have no precedential effect, but
16 even in their absence, application of the elements of collateral
17 estoppel requires the same result. In order for collateral
18 estoppel to apply, the following elements must be present: a prior
19 final judgment on the merits, the same parties or their privies
20 and the causes of action or grounds for recovery were, or could
21 have been, litigated in the prior case. *FDIC v. Jenson (In re*

23 ³Allowance of claims or interests.

24 ⁴Dischargeability of debts; See *Menk v. Lapaglia (In re*
25 *Menk)*, 241 B.R. 896 (9th Cir. B.A.P. 1999).

26 ⁵Turnover of property of the estate.

27 ⁶Subordination for purposes of distribution.

1 Jenson), 980 F.2d 1254 (9th Cir. 1992); *Federated Department*
2 *Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The original
3 answer/counterclaim recites 126 factual contentions which, if the
4 court has interpreted them correctly, attempt to allege
5 malpractice, breach of various duties owed from counsel to client
6 and other vague wrongful conduct on the part of the "counter-
7 defendants" arising out of their representation of Broadway
8 Buildings in its bankruptcy proceeding. The Amended Counterclaim
9 contains these same allegations. Without deciding whether they
10 are properly pled, such allegations could have been raised at the
11 hearing on objection to professional fees in the Bankruptcy Court
12 and are therefore barred by collateral estoppel. Therefore, the
13 "counterclaims" against Mark T. Young and Mark T. Young Law
14 Corporation are **DISMISSED** as being barred by collateral estoppel.

15 **FAILURE TO STATE A CLAIM**

16 The plaintiff also seeks dismissal of the debtor's
17 "counterclaims" under F.R.B.P. 12, asserting three grounds:
18 violation of F.R.B.P. 8's requirement of a short and plain
19 statement, lack of jurisdictional allegation and pleadings
20 alleging conclusory allegations are insufficient to state a claim.

21 **A. Conclusory Allegations**

22 Although the Court is to take all facts asserted by plaintiff
23 as true, conclusory allegations will not defeat a motion to
24 dismiss for failure to state a claim. *Nat'l Assn. for*
25 *Advancement...v. California Board of Psychology*, 228 F.3d 1043,
26 1049 (9th Cir. 2000); *Assoc. of General Contractors of America v.*
27 *Metropolitan Water District...*, 159 F.3d 1178, 1187 (9th Cir.

1 1998); *Pareto v. F.D.I.C.*, 139 F.3d 696 (9th Cir. 1998). Most of
2 the allegations contained within the counterclaims are simply
3 broad statements of alleged fact without specificity as to time,
4 place or alleged wrongdoing party. In addition to the requirement
5 to put a party on notice as to the claims against which it must
6 defend, claims of conspiracy, fraud & malpractice have to be pled
7 with specificity. There are no specific facts alleged in support
8 of any of these claims.

9 **B. F.R.B.P. 8**

10 The debtor's original answer/counterclaim was 31 pages, which
11 although one of the shorter pleadings filed by the defendant, is
12 certainly not a short or plain statement. At first blush, the
13 debtor's amended answer/counterclaim appears to be shorter in
14 length, containing only 17 pages, however, the debtor incorporates
15 by reference approximately 100 "factual statements" from his prior
16 Complaint, totaling 19 pages. Neither Complaint resembles a short
17 and plain statement. The standard set out in Rule 8 is a
18 straightforward one, requiring simple, concise & direct averments.
19 Most, if not all, of the "factual statements" in the counterclaim
20 portion of the debtor's answer contain conclusory allegations,
21 providing little specific information about what the debtor
22 complains and little basis on which a party defendant may
23 appropriately respond or defend. The amended answer/counterclaim
24 provides little more information except that it refers to a
25 failure by an unspecified party to give unspecified notices during
26 the pendency of the Broadway Buildings bankruptcy proceeding. Any
27 of these claims as they might refer to Mark T. Young or Mark T.

1 Young Law Corporation would be barred by the collateral estoppel
2 effect of the California Bankruptcy Court order approving
3 professional fees (See above). As to the remaining "Counter-
4 Defendants", the debtor's complaints do not provide a short &
5 plain statement of his causes of action and are therefore
6 **DISMISSED** for failure to state a claim. *McHenry v. Renne*, 84 F.3d
7 1172, 1179 (9th Cir. 1996).

8 **WITH PREJUDICE**

9 Ordinarily dismissal of a complaint for failure to state a
10 claim would be with leave to amend. Under proper circumstances,
11 i.e., when allowing leave to amend would be futile, the court has
12 the discretion to dismiss the complaint with prejudice. *Steckman*
13 *v. Hart Brewing, Inc.*, 143 F.3d 1293 (9th Cir. 1998). An
14 examination of the debtor's history in this District alone reveals
15 an inability or unwillingness by the debtor to state any claim or
16 request clearly and succinctly. The debtor's Amended Complaints
17 have more often than not been longer & more convoluted than the
18 originals⁷. When leave to amend has been denied, the debtor has
19 even amended his Complaint without regard for proper procedure or
20 court order⁸. The *McHenry* case describes perfectly the phenomenon
21 that exists here: the court spends hours delving through the


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23 ⁷See "Order Dismissing Plaintiff's Claims in Part by Judge
24 Robert H. Whaley," entered July 13, 2000 by the U.S. District
Court for the Eastern District of Washington in case No. 97-CD-
435, *McNeil, et al. v. Baker, et al.*

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26 ⁸See "Order by Judge Robert H. Whaley striking Second
27 Amended Complaint," entered August 31, 2000 by the U.S. District
Court for the Eastern District of Washington in case No. 97-CS-
435, *McNeil, et al. v. Baker, et al.*

1 debtor's rendition of the same tired old facts, struggling to
2 understand what argument he is inartfully asserting. After
3 granting leave to amend, an even more lengthy, less articulate
4 pleading is filed with the court and the parties again spend hours
5 struggling to understand the agreement. Accepting the debtor's
6 amended answer/counterclaim as being filed as a matter of right
7 and finding no greater clarity in it, the court finds that
8 dismissing with leave to amend would be futile and therefore
9 **DISMISSES** all of the debtor's "counterclaims" **WITH PREJUDICE**.

10 A separate Order of Dismissal will be entered commensurate
11 herewith. This Memorandum Decision shall constitute the court's
12 findings of fact and conclusions of law.

13 DATED this 24th day of May, 2002.

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16 PATRICIA C. WILLIAMS
17 Chief Bankruptcy Court Judge
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